

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

PATRICIA D. DAY,) CASE NO. 5:04CV00092
Plaintiff)
)
v.) REPORT AND RECOMMENDATION
)
JO ANNE B. BARNHART,) By: B. Waugh Crigler
Commissioner of Social Security,) U. S. Magistrate Judge
Defendant)

This challenge to a final decision of the Commissioner which denied plaintiff's November 1, 2002 claim for a period of disability, disability income benefits and supplementary security income benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416, 423 and 1381 *et seq.*, is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render a report to the presiding District Judge setting forth appropriate findings, conclusions and recommendations for the disposition of the case. The questions presented are whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the undersigned will RECOMMEND that an order enter AFFIRMING the Commissioner's final decision, GRANTING judgment to the defendant and DISMISSING the case from the docket of the court.

In a decision eventually adopted as a final decision of the Commissioner, a Law Judge found that plaintiff was insured from April 1, 2002, the alleged date of disability onset, through the date of his decision, and that she had not been engaged in any gainful activity since the alleged disability of onset. (R. 14, 22.) He also found that plaintiff, who was 49 years old at the time with an eighth grade

education, suffered the effects of a shoulder injury, a stroke, anxiety and depression, though he considered the shoulder injury to be her only severe impairment under the Act and regulations. (R. 19, 22.) He found none of plaintiff's impairments to meet or equal any listed impairment, though he further found plaintiff unable to perform her past relevant exertionally medium work as a production worker. (R. 14, 19, 21, 22.) Being of the opinion that plaintiff's complaints about the effects of her conditions were not entirely credible, he determined that she could perform less than a full range of light exertional activity which involved lifting less than 20 pounds occasionally/10 pounds frequently, reaching over her head with her left arm, sitting/standing/walking more than 6 hours in an eight-hour day, and avoiding unprotected heights. (R. 21, 23.) By application of the Medical-Vocational Guidelines ("grids") to plaintiff's exertional limitations and by reference to evidence adduced by a vocational expert (VE) who testified at the hearing, the Law Judge determined that jobs were available to a person with plaintiff's work-related capacity. (R. 21-23.) Accordingly, he found plaintiff not disabled under the Act. The Appeals Council found no basis in the record to grant review, denied review and adopted the Law Judge's decision as a final decision of the Commissioner. (R. 5-7.) This action ensued.

The Commissioner is charged with evaluating the medical evidence, assessing symptoms, signs and findings, and, in the end, determining the functional capacity of the claimant. 20 C.F.R. §§ 404.1527-404.1545; *Hays v. Sullivan*, 907 F.2d 1453 (1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). In that connection, the Commissioner regulatorily is granted some latitude in resolving inconsistencies in evidence and the court reviews the Law Judge's factual determinations only for clear error. 20 C.F.R. §§ 404.1527 and 416.927; *See also Estep v. Richardson*, 459 F.2d 1015, 1017 (4th Cir. 1972). In the end, if the Law Judge's resolution of the conflicts in the evidence is supported

by substantial evidence then the Commissioner's final decision must be affirmed. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

Plaintiff met her burden in the sequential evaluation process and demonstrated the presence of a severe impairment which prevented her from performing her past relevant work. 20 C.F.R. §§ 404.1520 and 416.920; *Hunter v. Sullivan*, 993 F.2d 31 (4th Cir. 1992). The burden then shifted to the Commissioner to demonstrate that alternate gainful activity was available to her. The Commissioner could discharge her burden at the final sequential level of the evaluation only by the presentation of vocational evidence since there was evidence that plaintiff suffered non-exertional limitations on her ability to perform work-related functions. *Hall v. Harris*, 658 F.2d 260 (4th Cir. 1981); *McLain v. Schweiker*, 715 F.2d 866 (4th Cir. 1983); *Coffman v. Bowen*, 829 F.2d 514 (4th Cir. 1987). For the testimony of a VE to be relevant, the VE was required to have considered all the evidence in the record material to plaintiff's limitations and their effects on her work-related capacity. *Walker v. Bowen*, 889 F.2d 47 (4th Cir. 1989). Otherwise, the Commissioner could not be viewed by a reviewing court as having properly discharged her sequential burden.

The outcome on judicial review depends entirely on whether there was substantial evidence to support the Law Judge's determination that plaintiff was not entirely credible and that she possessed the residual functional capacity for some light work. The reason for this is that the VE responded to the Law Judge hypothetical question encompassing such facts by identifying jobs available to a person with the limitations and capacity found by the Law Judge. (*See*, R. 360-362.) Interestingly, if the plaintiff was limited to lifting 5 to 10 pounds, instead of 10 to 25 pounds, the VE opined that no jobs would be available to her in the purely sedentary work category because people who work in that category need "good use"

of both arms. (R. 362.)

The record is replete with medical evidence which the undersigned does not believe needs to be recited here. Suffice it to say, the evidence which provided the touchstone for the Law Judge findings regarding plaintiff's functional capacity was a report dated February 12, 2004 from her own treating physician, Dwight Kemp, D.O., who was communicating with plaintiff's counsel in an effort to clarify "Ms. Day's situation at this time." (R. 264.) Undeniably, Dr. Kemp reveals significant injury to plaintiff's left shoulder, but he most clearly states, "Her elbow and wrists were not affected and her other extremities were not affected. She remains able to walk, carry items in her right arm, and perform low waist-level activities with her left arm with lifting about 20 pounds maximum. She is unable to raise her left arm over her head and this is permanent." (*Id.*) The physician also revealed that plaintiff did not need medications which would impair her ability to work around machinery or her ability to drive, so long as she did not drive commercial vehicles. (*Id.*) It is the view of the undersigned that this evidence provides substantial support for the Law Judge's findings concerning plaintiff's residual functional capacity.

Moreover, the undersigned believes that the Law Judge's credibility findings are supported by the substantial evidence, though based, in part, on plaintiff's daily activities. (R. 19.) While a claimant's daily activities that amount merely to caring of oneself, including household activities and the like, are not to be considered substantial gainful activity, the level and the degree to which daily activities demonstrate the presence, intensity and persistence of symptoms and, ultimately an ability to function in a vocational setting, are factors the Commissioner may consider in determining a claimant's work-related capacity. 20 C.F.R. §§ 404.1529(c)(3)(i) and 404.1572(c).

Candidly, the undersigned cautiously approaches the Commissioner's use of daily activities either as a basis to discredit a claimant's testimony about the vocational effects of any malady or as a basis for hypothetical questions to a VE concerning the claimant's work-related limitations. There are two reasons

for such caution. First, the evidence ordinarily adduced about the claimant's daily activities most often fails to rise above simply caring for one's self, thus bearing little connection to a vocational setting. Second, the Law Judge's findings and conclusions about the claimant's daily activities often run counter to substantial medical evidence concerning the claimant's residual functional capacity and appears to be offered as a rationale or justification for the Law Judge's rejection of that evidence where no other justification otherwise appears in the record. Here, however, the plaintiff's treating source, as well as the other medical evidence in the record, is consistent with the Law Judge's assessment of plaintiff's functioning based on her daily activities.

In the end, the undersigned is of the view that there is substantial evidence in the record, as a whole, to support the Commissioner's final decision. It is RECOMMENDED that an order enter AFFIRMING the final decision of the Commissioner, GRANTING judgment to the defendant and DISMISSING this action from the docket of the court.

The Clerk is directed to immediately transmit the record in this case to the presiding United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

Date